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### Law, Society, and Medical Malpractice Litigation in Japan

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# LAW, SOCIETY, AND MEDICAL MALPRACTICE LITIGATION IN JAPAN

ERIC A. FELDMAN\*

## I. INTRODUCTION

This Essay examines conflict over medical malpractice claims in Japan, and uses it as a lens through which to view the relationship between tort law and its social, economic, and political context. Allegations of medical malpractice in Japan have been rising rapidly. What explains the increasing willingness of people who believe that they are victims of medical malpractice to sue? And what (if anything) does the upswing in malpractice litigation suggest about the changing role and importance of the legal system in the lives of the Japanese people?

The relationship between law and society in Japan has long been the source of scholarly speculation, and occasionally the topic of serious academic analysis.<sup>1</sup> The two most widely held points of view are dramatically different. One suggests that “Japanese culture” (rarely defined but generally assumed to encompass social values, norms of behavior, and modes of interpersonal interaction) places a high premium on the preservation of social harmony and the avoidance of open conflict.<sup>2</sup> In that view, the language of law is subordinate to the power of social integration, and leads people to forego lawsuits. The other explanation for Japan’s low litigation rates posits a more structural cause, namely that the elite have created barriers to inhibit access to the legal system and limit the extent to which courts can be a potent force of social change.<sup>3</sup> Among the

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1. Eric A. Feldman, *Law, Culture, and Conflict: Dispute Resolution in Postwar Japan*, in *LAW IN JAPAN: A TURNING POINT* 50 (Daniel H. Foote ed., 1997); Anthony Cole, *Commercial Arbitration in Japan: Contributions to the Debate on Japanese “Non-Litigiousness,”* 40 N.Y.U. J. INT’L L. & POL. 29 (2007).

2. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 41 (Arthur T. von Mehren ed., 1963).

3. John Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 373 (1978); FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 16 (1987).

most important of those barriers are constraints on the number of licensed attorneys, the imposition of high case filing fees, a slow and costly civil litigation process, and limited damage awards.<sup>4</sup>

Medical malpractice litigation provides an ideal opportunity to reexamine these conflicting theories about the relationship between law and society in Japan. Over the past several decades, particularly the past ten years, medical malpractice lawsuits have increased rapidly.<sup>5</sup> The numbers are small, but the rates of increase are not. From only 102 malpractice claims filed in Japanese courts in 1970, the number escalated ten-fold to 1003 in 2003; in the decade between 1992 and 2002 claims grew by almost 150%, from 371 to 906.<sup>6</sup> To what extent does this support the view that cultural constraints to litigation have softened over the past decades? Does it suggest that structural barriers previously inhibiting access to the formal legal system have been reconfigured?

Unlike most analyses of litigation in Japan that examine its relative infrequency, this Essay focuses on the growing frequency of medical malpractice litigation and offers an explanation for its cause and consequences. It claims that more malpractice claims are reaching the courts for both cultural and structural reasons. First, formidable structural barriers to civil litigation have been softened, some that affect all civil cases and others specific to medical malpractice. The increasing size of the bar, for example, makes it easier for potential plaintiffs to find attorneys, and the creation of a new expert witness system expedites malpractice suits. Second, these structural changes have occurred in, and are intertwined with, a broader social and political climate that is increasingly fertile ground for the escalating rates of malpractice claiming. An overall decrease in the trust placed in medical elites, for example, and media coverage that highlights malfeasant doctors have created an atmosphere in which malpractice litigation is increasingly attractive.

The consequence and broader significance of the rise in medical malpractice claims, although speculative, is far-reaching. The interaction of structural changes that facilitate the use of the courts with broader

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4. Haley, *supra* note 3, at 378–89.

5. As claims have escalated, so too has the public discourse, with the media, medical and legal organizations, elected officials, bureaucrats, and others debating the cause of the escalation and what (if anything) should be done in response. See, e.g., Andrew Feld, *Culture and Medical Malpractice: Lessons from Japan. Is the "Reluctant Plaintiff a Myth?"*, 101 AM. J. GASTROENTEROLOGY 1949–50 (2006).

6. See SUPREME COURT OF JAPAN, IJIKANKEISOSHŌ JIKEN NO SHINRYŌKAMOKUBETU KISAI KENSU [REPORT OF THE MEDICAL MALPRACTICE LITIGATION COMMISSION (REPORT 4, NUMBER OF MEDICAL MALPRACTICE CASES RESOLVED BY PRACTICE)] (2005), [http://www.courts.go.jp/saikosai/about/iinkai/izikankei/toukei\\_04.html](http://www.courts.go.jp/saikosai/about/iinkai/izikankei/toukei_04.html) [hereinafter MEDICAL MALPRACTICE REPORT 4].

socio-political changes that reinforce the attractiveness of litigation could well cause the number of medical malpractice lawsuits to continue to rise. Although that interaction is difficult to document, it is relatively easy to describe. The creation of specialized medical courts and the increasing availability of attorneys, for example, underscore the legitimacy of seeking legal advice and the acceptability of formalizing one's grievances into lawsuits. As the demand for attorneys grows and more claims are filed, a greater number of lawyers will be attracted to medical malpractice as a field of expertise, and courts will accommodate the growing caseload.

Further, the rise in medical malpractice claims highlights a significant departure from the government's long-standing approach to the filing of tort-related claims, which had effectively shut the door to tort litigation. Potential litigants faced such daunting institutional barriers to suing that they had little choice but to resolve their claims through alternative channels. Ultimately, people came to prefer extra-judicial solutions to formal legal institutions. Now, through a number of loosely related reforms, the government is loosening and lessening the barriers to the courts by, for example, licensing additional lawyers, creating new court procedures that have led to shorter trials, streamlining the process for recruiting expert witnesses, and designating specialized courts to resolve medical malpractice lawsuits. Whereas a rise in the incidence of tort-based litigation was once a catalyst to the creation of alternative means of dispute resolution or administrative compensation systems, medical malpractice litigants are now promised a faster, more narrowly tailored legal process that makes suing increasingly attractive.<sup>7</sup> What this shift demonstrates is a new legitimacy for litigation, and an increasingly important place for law in the lives of Japanese citizens. Such a claim is difficult to support empirically; the data and observations offered in this Essay outline the argument and begin to build the case.

## II. MEDICAL MALPRACTICE IN JAPAN: THE ESCALATION OF LITIGATION

As indicated earlier, the frequency of medical malpractice litigation has changed dramatically over the past several decades. In 1970, only 102 new malpractice cases were filed in Japan. That number increased to 310 in 1980, varied between 196 and 381 from 1980 to 1992, and then began to

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7. CURTIS J. MILHAUPT & MARK D. WEST, *ECONOMIC ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN: THE IMPACT OF FORMAL AND INFORMAL RULES* 241 (2004) (observing "increased legalization" in Japanese corporate governance and noting that "[t]he role of lawyers in the Japanese economy, and in society generally, will continue to increase.").

climb, reaching 795 new filings in 2000 and 1110 in 2004 before dropping slightly over the next two years.<sup>8</sup> The backlog of malpractice cases also steadily rose from the early 1990s through 2004, leading to a growing concern about whether courts are able to resolve malpractice claims in a timely manner.<sup>9</sup> And for the first time, in 2000 and 2001, more medical malpractice cases were resolved through litigation than court-supervised mediation, and in some instances plaintiffs had joined forces by aggregating their claims.<sup>10</sup> Finally, the number of cases brought against government-owned or -operated hospitals also increased in the late 1990s and early 2000s, a category of cases that directly affects the state's financial well-being and reputation.<sup>11</sup> Compared to the overall increase in the rate of civil litigation in Japan since the late 1980s—a rise of approximately twenty-nine percent in district court filings, the bulk of which involved bad loans and debt collection—the rise of medical malpractice litigation is dramatic.<sup>12</sup>

TABLE 1: MEDICAL MALPRACTICE CLAIMS IN JAPAN, 1994–2006<sup>13</sup>

year	new claims	pending claims	disposed claims	percent settled ( <i>wakai</i> )	percent resulting in a judicial decision
1992	371	1257	364	-----	-----
1993	442	1352	347	-----	-----
1994	506	1466	392	-----	-----

8. See SUPREME COURT OF JAPAN, IJIKANKEISOSHŌ JIKEN NO SHORIYŌKYŌ OYOBI HEIKINSHINRIKIKAN [REPORT OF THE MEDICAL MALPRACTICE LITIGATION COMMISSION] (2005), [http://www.courts.go.jp/saikosai/about/iinkai/izikankei/toukei\\_01.html](http://www.courts.go.jp/saikosai/about/iinkai/izikankei/toukei_01.html) [hereinafter MEDICAL MALPRACTICE REPORT 1]; MEDICAL MALPRACTICE REPORT 4, *supra* note 6; Kazue Nakajima et al., *Medical Malpractice and Legal Resolution Systems in Japan*, 285 J. AM. MED. ASS'N 1632, 1632 (2001).

9. MEDICAL MALPRACTICE REPORT 1, *supra* note 8. Cases primarily involve internal medicine (approximately twenty-five percent of all cases), surgery (approximately twenty percent), and obstetrics (fifteen percent).

10. For example, over two dozen families of patients injured by heart operations at Tokyo Women's Medical University Hospital created the *Higaisha Renrakukai* and filed both civil and criminal charges. *Patients' Families to Sue Hospital over Malpractice*, DAILY YOMIURI, July 21, 2003.

11. Report: 32 Malpractice Suits Filed During 9-Month Period, DAILY YOMIURI, Jan. 11, 2003.

12. Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31, 56 (2006) (arguing that the relatively modest overall increase in litigation rates (compared to medical malpractice) since the 1980s is evidence of the importance of institutional, not cultural, barriers to litigation).

13. See SUPREME COURT OF JAPAN, REPORT OF THE MEDICAL MALPRACTICE LITIGATION COMMISSION (2002), <http://www.courts.go.jp/saikosai/about/iinkai/izikankei> (last visited Mar. 14, 2008) [hereinafter MEDICAL MALPRACTICE REPORT 3].

year	new claims	pending claims	disposed claims	percent settled ( <i>wakai</i> )	percent resulting in a judicial decision
1995	488	1528	426	46.5	40.4
1996	575	1603	500	51.8	35.4
1997	597	1673	527	52.8	36.6
1998	632	1723	582	49.0	39.9
1999	678	1832	569	46.9	40.4
2000	795	1936	691	45.9	44.1
2001	824	2038	722	44.0	46.3
2002	906	2075	869	43.8	44.4
2003	1003	2043	1035	49.1	39.2
2004	1110	2149	1004	46.1	40.3
2005	999	2086	1062	49.8	37.7
2006	913	1860	1139	53.3	35.3

Added to the increase in civil litigation, there has also been a rise in police reports alleging malpractice.<sup>14</sup> Article 21 of the Medical Act (*Ishi-hō*) imposes a duty on physicians to notify the police when they observe what they believe is a “suspicious” death.<sup>15</sup> The exact criteria for what counts as “suspicious” are unclear, and a number of medical societies have struggled to define the types of cases that should trigger the reporting requirement. In April 2004, the Supreme Court issued a ruling in a widely reported case involving a hospital error and subsequent cover-up that challenged the reporting requirement as a violation of the right against self-incrimination.<sup>16</sup> The Court affirmed the duty to report, but failed to clarify the types of cases that must be reported. The notoriety of that case drew attention to the rapid escalation of police reports, which went from 21 cases in 1997, to 124 in 2000, to 248 in 2003.<sup>17</sup> In short, the number of newly filed medical malpractice litigation cases has increased quickly in Japan, the backlog of pending cases is much larger than in the past, and deaths that may be the result of malpractice have a greater likelihood of being reported to the police. Along a number of important dimensions, the

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14. For a discussion of the role of criminal law in medical malpractice litigation in Japan, see Robert B. Leflar & Futoshi Iwata, *Medical Error As Reportable Event, As Tort, As Crime: A Transpacific Comparison*, 12 WIDENER L. REV. 189, 219 (2005).

15. Kenichi Yoshida et al., *New Investigative Organization Will Be Enacted for Potentially Therapeutic Deaths in Japan* (2005) (unpublished paper, on file with author).

16. *Okai v. Japan*, 58 KEISHŪ 247 (Sup. Ct., Apr. 13, 2004).

17. Robert B. Leflar & Futoshi Iwata, *supra* note 14, at 219 fig.2.

relations between doctors and patients are more “legalized” than they were just a decade ago.<sup>18</sup> The rapid rate of increase in medical malpractice litigation not only raises the possibility that medical malpractice litigation could continue unabated, but it also poses questions about why such litigation has become more common and how its increase should and could be managed.

### III. JAPAN’S LAW OF NEGLIGENCE, THE CIVIL LITIGATION SYSTEM, AND HOW THEY ARE CHANGING

Those who believe that they have been injured as the result of a medical error can pursue a legal remedy under the substantive law of torts (*fuhō kōi*).<sup>19</sup> Tort law in Japan, unlike the plethora of conflicting rules one finds in different states of the United States, is codified and national, and the basic legal principle underlying tort-related harms is stated in article 709 of the Civil Code. Based on the nineteenth century German law of accidents, the article states that “A person who has intentionally or negligently infringed any right of others, or legally protected interest of others, shall be liable to compensate any damages resulting in consequence.”<sup>20</sup> As in American tort law, the central elements of a malpractice claim brought under article 709 are the establishment of a duty of care (*chūi gimu no teido*), evidence that the duty was breached (*ihan*), a

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18. In comparison to the United States, the incidence of medical malpractice litigation in Japan is modest. In 2002, there were approximately 250,000 physicians in Japan (out of a population of 127 million)—159,131 working in hospitals and 90,443 in clinics—who received a total of 606,399,536 outpatient office visits (an average of almost five annual visits per person), and made almost 14 million hospital admissions. Kōsei Tōkei Yōran [Directory of Public Health Statistics] (2002), available at <http://www.wdbtk.mhlw.go.jp/toukei/youran/data16k/2-47.xls>. In the United States that same year, there were 853,000 physicians, a population of almost 290 million, 1,083,500,000 outpatient visits (3.74 annual visits per person) and close to 34 million hospital admissions. U.S. Census Bureau, Statistical Abstract of the United States: 2004–2005, at 7, 107, 109, 113 available at <http://www.census.gov/prod/www/statistical-abstract-04.html> (follow hyperlinks under “2004” for “Section 1: Population” and “Section 3: Health and Nutrition”) (last visited Mar. 9, 2009). Based on that data, one might expect a malpractice rate in the United States two to four times higher than that in Japan. In fact, there were more malpractice cases filed in Philadelphia in 2000, 2001, and 2002 than in all of Japan. The Unified Judicial Sys. of Pa., Pennsylvania Medical Malpractice Case Filings: 2000–2007, <http://www.pacourts.us/Links/Media/MedicalMalpractice/> (follow the “Med Mal Filing Statewide 2000–2007” hyperlink) (last visited Oct. 27, 2008).

19. Medical malpractice claims can be brought under tort or contract law, and frequently lawsuits include both claims. Ultimately, the legal question is identical—did the provider satisfy the duty of care, and, if not, did the provider’s breach cause the plaintiff’s injuries? See MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 67–68 (1999). Practical differences include a three-year statute of limitations for tort claims versus ten years for contract claims, and differences in damage awards.

20. MINPŌ [CIVIL CODE], art. 709.

causal link (*inga kankei*) between the breach and the harm, and damages (*songai baishō*). The crux of a malpractice case is generally the identification of the applicable standard of care, the determination of whether or not the defendant provider met the standard, and the analysis of the causal relationship between the defendant's actions and the plaintiff's injuries.

A great deal depends upon how the standard of care is defined, which party must bear the burden of proving to the court that the defendant did or did not exercise due care, and which party is required to show that the defendant's actions did or did not cause the plaintiff's harms. The standard of care in Japanese malpractice cases is determined with reference to national rather than local practice.<sup>21</sup> With regard to the burden of proof (*shōmei sekinin*), Japanese courts treat medical malpractice just like other tort claims and require plaintiffs to prove the central elements of their allegations.<sup>22</sup> As Japanese academic commentary on the burden of proof in malpractice claims uniformly asserts, the burden of proof falls on plaintiffs, and interviews with judges and malpractice attorneys confirm that plaintiffs are required to establish the *prima facie* elements of their claims. Only after they have done so must defendants argue that they met the standard of care, or that their actions did not cause the alleged harm.<sup>23</sup>

21. Kiichi Nishino, *Iryō Suijyun to Iryō Kankō* [Medical Standards and Medical Practice], in IRYŌ KAGO SOSHŪ HŌ [MEDICAL MALPRACTICE LITIGATION] 109 (Ōta Yukio ed., 2000).

22. For a discussion of standards of proof in civil and common law jurisdictions, see Kevin M. Clermont, *Standards of Proof in Japan and the United States*, 37 CORNELL INT'L L.J. 263, 264 (2004) (arguing that in civil cases Japanese courts require proof "to a high probability similar to beyond a reasonable doubt"). See also Yasuhei Taniguchi, *The 1996 Code of Civil Procedure of Japan—A Procedure for the Coming Century?*, 45 AM. J. COMP. L. 767 (1997). Obtaining evidence in malpractice cases can be difficult. The Japan Medical Association has successfully fought a law that would give patients the right to see their medical records. The Medical Practitioners Law (*Ishi-hō*) requires that physicians create and store charts, but only for five years, and it lacks sanctions for the alteration of patients' records. In 2003, the Japanese Diet passed the *Kojin Jyōhō Hogo ni Kansuru Hōritsu*. *Kojin Jyōhō Hogo ni Kansuru Hōritsu* [Personal Information Protection Law], Law No. 57 of 2003. Although this law did not address the issue of access to medical records, the Ministry of Health, Labor, and Welfare ("MHLW") issued interpretive guidelines that specified the conditions under which patients in government-operated medical facilities could access their medical records. See KŌSEIRŌDŌSHŌ, IRYŌ-KAIGO KANKEI JIGYŌSHA NI OKERU KOJIN JYŌHŌ NO TEKISETSUNA TORIATSUKAI NO TAME NO GAIDORAIN [GUIDELINES FOR THE MANAGEMENT OF PERSONAL INFORMATION BY EMPLOYEES OF MEDICAL AND ELDERLY CARE FACILITIES] (2004) [hereinafter KŌSEIRŌDŌSHŌ]. Many patients remain unable to access their records.

23. See, e.g., Yoshihisa Nomi, *Medical Liability in Japanese Law*, in MODERN TRENDS IN TORT LAW: DUTCH AND JAPANESE LAW COMPARED 29 (Ewoud Hondius ed., 1999) (describing how plaintiffs in medical malpractice cases "must prove that the doctor's conduct fell below the level of the standard established by law"). For a different view, see RAMSEYER & NAKAZUTO, *supra* note 19, at 67, who claim that "courts deliberately switch the burden" and impose it on tort defendants (rather than plaintiffs), who must demonstrate that they met the standard of care or that their actions did not cause the plaintiff's harms.



In short, by requiring plaintiffs to bear the burden of proof in medical malpractice cases, Japanese courts effectively limit the number of malpractice claims that can succeed.

In addition to the specific legal elements of tort malpractice cases, several long-standing features of the Japanese legal system have a significant bearing on the initiation and resolution of medical malpractice claims, and changes to some of those features appear to be a factor in the increasing prevalence of malpractice litigation. For many years, for example, the bar association regulated the compensation of attorneys in Japan. Although the association's fee schedule has been formally abolished, it is still a reasonable guide, since many lawyers continue to bill clients in accordance with the guidelines.<sup>24</sup> With the fee schedule formally eliminated (the bar association argued that it was a restraint on trade), attorneys are now free to impose contingency fees. Some have reduced their retainers and added a twenty percent contingency fee, but relatively few have abandoned up-front payments by plaintiffs for a flat thirty percent contingency fee arrangement. The ability to pursue malpractice claims less expensively is likely to increase the number of potential malpractice claimants. Its impact on attorneys is less clear. Shifting some of the financial risk of medical malpractice claims to attorneys may decrease their willingness to handle such cases. But it could also attract risk-taking attorneys who would not have otherwise worked in the tort law or malpractice area.

In addition to a retainer, plaintiffs have long been required to pay a case filing fee (*tesūryō*) to the court. The fee is based on the amount of the claimed damages and is determined as described in Table 2.<sup>25</sup>

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24. In malpractice (and other civil) cases, according to the guidelines, plaintiffs cover their attorney's out-of-pocket costs and pay a retainer. For cases in which plaintiffs seek less than ¥3,000,000, they pay a retainer of eight percent; between ¥3,000,000 and ¥30,000,000, the retainer is five percent; between ¥30,000,000 and ¥300,000,000, plaintiffs pay three percent; and over ¥300,000,000, the fee is two percent. See JAPAN FEDERATION OF BAR ASSOCIATIONS, INTRODUCTORY PAMPHLET 24 (2000), available at <http://www.nichibenren.or.jp/en/about/img/jfba.pdf>. In addition to the retainer, attorneys could (and often did) add a thirty percent premium to the fee, and if they won the case they would double the initial retainer. *Id.*

25. YOSHITAKA WADA & SHŌICHI MAEDA, IRYŌ FUNSŌ: MEDICARU KONFUREKUTO MANĒJIMENTO NO TEIAN [CONFLICT OVER MEDICAL TREATMENT: A PROPOSAL FOR MEDICAL CONFLICT MANAGEMENT] 142 (2001).

TABLE 2: DETERMINATION OF CASE FILING FEE

Damages Sought by Plaintiff	Amount Paid to the Court
Less than ¥300,000	¥500 for each ¥50,000
¥300,000 to ¥1 million	¥400 for each ¥50,000
¥1 million to ¥3 million	¥700 for each ¥100,000
¥3 million to ¥10 million	¥1000 for each ¥200,000
¥10 million to ¥100 million	¥1000 for each ¥250,000
¥100 million to ¥1 billion	¥3000 for each ¥1 million
Over ¥1 billion	¥10,000 for each ¥5 million

The filing fee, along with the retainer, requires a significant investment by potential malpractice plaintiffs. This investment is particularly difficult for those who are young and of modest means, who are the most likely to sue over so-called “bad baby” cases—those involving a child born with a serious neurological, physical, or intellectual impairment. In the United States, such cases are particularly attractive to attorneys and often lead to generous jury awards. But in Japan, even though cases involving impaired newborns represent some of the highest court-awarded damages in the malpractice area,<sup>26</sup> few such cases reach the courts because new parents, generally in their late twenties or early thirties, are unable to afford the approximately forty thousand dollars needed to initiate a one million dollar case. So far, only modest changes have been made to the filing fee requirement, and it remains a disincentive to litigation.

Likewise, the determination of civil damages in Japan also suppresses litigation. There are no juries in civil cases, which eliminates at least some of the uncertainty experienced by parties to medical malpractice claims in the United States.<sup>27</sup> Moreover, damage calculations by Japanese courts result in awards that are both modest and predictable.<sup>28</sup> No punitive damages are permitted in Japan, and cases that might lead to such damages

26. The initial payments in malpractice cases steadily decrease as a plaintiff’s age increases, a function of the decrease in damages requested. *Id.* at 143. For plaintiffs ages 0–19, the average sum of attorney retainer and filing fees is ¥3,149,119; from ages 20–39, ¥2,297,272; for those 40–59, ¥2,280,118; and for those 60–79 years old, ¥1,876,676. *Id.*

27. For a discussion of the predictability of Japanese courts, see Mark J. Ramseyer, *Reluctant Litigant Revisited: Rationality and Disputes in Japan*, 12 J. JAPANESE STUD. 111, 114 (1988). For an analysis of using juries in malpractice cases, see Yoshihane Kawabata, *Shimin no Shihō no Jitsugen no tame hi-Hōsō-Ichigen, Bai-Sanshin Seido to Kokumin Shuken* [The Realization of Citizen’s Justice—Common Training of Legal Profession, Jury System and Lay Judge System, and Popular Sovereignty], 5 GAKUJUTSU NO DOKŌ 27, 30–31 (2000).

28. Leflar & Iwata, *supra* note 14, at 200.

in the United States are generally handled by the Japanese criminal law.<sup>29</sup> Compensatory damages as well as payments for pain and suffering in medical malpractice closely follow those for personal injuries that result from automobile accidents. Both types of damages are determined with reference to what is colloquially known as the “Red Book,” a bright red guide to traffic accident harms published annually by one of Tokyo’s lawyers’ associations.<sup>30</sup> The Red Book contains hundreds of traffic accident diagrams that help courts and insurance adjusters evaluate the cause of and responsibility for particular types of crashes, as well as actuarial tables that provide guidelines and illustrations for the calculation of damages. They include “active” damages (*sekkyoku songai*), such as the cost of hospitalization, massage therapy, visits to hot springs, and the like, and “passive” damages (*shōkyoku songai*), which refer to losses like missed salary.<sup>31</sup> The Red Book also offers a relatively simple approach to pain and suffering damages (*isharyo*), providing a matrix that takes into account the type of injury; the length of hospitalization; as well as the age, gender, and wage-earning status of the plaintiff, among other factors.<sup>32</sup> Unlike the individualized and highly variable pain and suffering damages in U.S. tort litigation, in Japan the reliance on a standard set of factors leads to a modest variance between the lowest and highest payments.

As a result, plaintiffs’ demands for damages are likely to approximate those suggested by the Red Book. Damages in medical malpractice cases in Japan are thus more predictable and more modest than in the United States. As a result, plaintiffs are reluctant to invest in significant retainers and filing fees when winning their case leads to a limited payout, perhaps one they could have negotiated outside of court.

Another structural factor that contributes to the increase in malpractice litigation is the growing number of attorneys willing to take malpractice cases. In part, the availability of attorneys is a consequence of the contraction of other types of legal work in the 1990s, particularly real estate, which kept many solo practitioners busy during the economic boom of the 1980s. Additionally, a generation of lawyers who came of age during the 1960s and embraced medical malpractice work as part of a

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29. For a thorough discussion of the criminal law approach to medical malpractice in Japan, see generally *id.*

30. TOKYO SAN BENGOSHIGAI KŌTSŪ JIKO SHORI INKAI [TOKYO’S THREE BAR ASSOCIATIONS TRAFFIC ACCIDENT COMM.], MINJI KŌTSŪ JIKO SOSHŌ SONGAI BAISHŌGAKU SANNTTEI KIJYUN [CIVIL TRAFFIC ACCIDENT LITIGATION] (2001).

31. *Id.* at 1–56.

32. *Id.* at 57–72.

belief in patients’ rights has reached full maturity.<sup>33</sup> That generation has successfully passed on its commitment to representing plaintiffs in malpractice cases to an increasing number of younger attorneys, some of whom now have their own practices, and some of whom work in firms but do pro bono work on behalf of the victims of medical accidents.<sup>34</sup> In fact, there appears to be a correlation between the increase in the total number of attorneys in Japan and rising rates of medical malpractice claims. As demonstrated in Table 3, the number of attorneys in Japan has been steadily increasing since 1960, and between 1990 and 2005 the lawyer population increased more than fifty percent, whereas the overall population grew by less than five percent.

TABLE 3: NUMBER OF LICENSED ATTORNEYS AND TOTAL POPULATION OF JAPAN<sup>35</sup>

Year	Attorneys	Population of Japan
1960	6,321	94,301,623
1965	7,082	99,209,137
1970	8,478	104,665,171
1975	10,115	111,939,643
1980	11,441	117,060,396
1985	12,604	121,048,923
1990	13,800	123,611,167
1995	15,108	125,570,246
2000	17,126	126,925,843
2005	21,185	127,760,000

Even more dramatic is the increase in the number of women licensed to practice law, shown in Table 4. Not only do they often find it difficult or unattractive to work in traditional firms, but for some, medical malpractice

33. Eric A. Feldman, *Patients’ Rights, Citizen’s Movements, and Japanese Legal Culture*, in *COMPARING LEGAL CULTURES* 227 (David Nelkin ed., 1997).

34. Leflar & Iwata, *supra* note 14, at 202 n.46.

35. See JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 24; MINISTRY OF INTERNAL AFFAIRS & COMMUNC’NS, FINAL REPORT OF THE 2000 POPULATION CENSUS, *available at* <http://www.stat.go.jp/English/data/kokusei/2000/final/hyodai.htm> (follow hyperlinks for “Statistical Table List,” then “Statistical tables presented in the report,” then “Population, Population Change, Area and Population Density of Japan: 1920 to 2000”) (last visited Oct. 28, 2008); MINISTRY OF INTERNAL AFFAIRS & COMMC’NS., INTERCENSAL ADJUSTMENT OF CURRENT POPULATION ESTIMATES (2000–2005), *available at* <http://www.stat.go.jp/english/data/jinsui/2-3.htm> (follow “II Statistical Tables” hyperlink; then follow “Population by Sex for Japan—Total population, Japanese population (as of the First Day of Each Month)” hyperlink) (last visited Jan. 18, 2009).

has a special appeal. Women are generally the primary care givers in Japanese households and are more likely to have frequent (and potentially negative) interactions with the health care system. This reality may lead them to make medical malpractice their professional focus.<sup>36</sup>

TABLE 4: NUMBER OF LICENSED FEMALE ATTORNEYS IN JAPAN<sup>37</sup>

Year	Female Attorneys
1960	42
1965	79
1970	179
1975	299
1980	420
1985	587
1990	766
1995	996
2000	1,530
2005	2,648

In a variety of ways, therefore, the structure of the Japanese legal profession and the substance of Japanese tort law affect the frequency and outcomes of malpractice lawsuits.<sup>38</sup> Although none of the factors described above are targeted specifically at medical malpractice litigation, each of them has an impact on malpractice lawsuits, and certain recent changes to them appear to be altering both the rate of malpractice filings and how they are resolved.

IV. REFORMING MEDICAL MALPRACTICE LITIGATION: THE PACE AND ACCURACY OF JUSTICE

Of equal or perhaps greater importance, several structural changes were recently implemented that are aimed directly at two issues of particular importance to medical malpractice litigants—the length of time it takes for claims to be resolved, and the accuracy of court judgments that deal with

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36. Another group that may become central to malpractice litigation in Japan is physicians who matriculate at one of Japan's new postgraduate law schools. At one school (Omiya Law School) ten of eighty first year students in 2004 had medical degrees. Attorneys with specialized medical knowledge are likely to be attracted to legal practices that build on their unique skills.

37. See JAPAN FEDERATION OF BAR ASSOCIATIONS, *supra* note 24.

38. Demographic changes may also play a role, and it is possible that elderly individuals with time and money are more likely to sue.

technical scientific and medical issues. William Gladstone’s maxim that “justice delayed is justice denied” has particular salience in Japan. The languid pace of trials, in which cases are scheduled to be heard discontinuously (e.g., one day each month) rather than from start to finish, has long been identified as one reason why Japanese plaintiffs find litigation an unsatisfying approach to conflict resolution. Justice officials and others involved in Japan’s legal reform activities, acutely aware of such concerns, made the acceleration of court proceedings a reform priority. But speed has the potential to work against accuracy, particularly in cases that require detailed scientific or medical knowledge. It is perhaps not surprising, therefore, that two recent changes bearing directly on medical malpractice, the development of a new system for calling expert witnesses and the creation of specialized medical courts, are targeted at speeding up malpractice trials and ensuring that judgments in such cases are as accurate as possible.

Data on the pace of civil justice underscore the view that the infrequency of medical malpractice litigation might in part be the result of the length of time it takes courts to resolve malpractice claims. As illustrated in Table 5, between 1994 and 2006 such claims took far longer to resolve than other civil claims. Although the pace of resolving both malpractice and non-malpractice claims has increased over that period—dramatically so in the case of malpractice—in 2006 it still took an average of 25.1 months for the average malpractice case to move from filing to final judgment in the district courts (the first-resort trial court for such cases), and far longer for appealed cases.

TABLE 5: LENGTH OF TIME BETWEEN THE FILING AND FINAL JUDGMENT OF MALPRACTICE CASES AND CIVIL CASES IN DISTRICT COURTS, 1994–2006 (IN MONTHS)<sup>39</sup>

Year	Medical Malpractice Cases	All Civil Cases
1994	41.4	9.8
1995	38.8	10.1
1996	37.0	10.2
1997	36.3	10.0
1998	35.1	9.3
1999	34.5	9.2
2000	35.6	8.8

39. MEDICAL MALPRACTICE REPORT 1, *supra* note 5.

Year	Medical Malpractice Cases	All Civil Cases
2001	32.6	8.5
2002	30.9	8.3
2003	27.7	8.2
2004	27.3	8.3
2005	26.9	8.4
2006	25.1	7.8

The fact that a typical malpractice case takes more than three times longer than a civil case to be resolved increasingly came to be seen as an unfair barrier to malpractice litigants. Indeed, the government's Justice System Reform Council, which has since 1999 been at the forefront of reforming Japan's legal system to make it more accessible to its citizens, has taken a particular interest in accelerating the pace of civil claims generally, and malpractice specifically. In its politically influential 2001 report, it advocated the implementation of a variety of changes that would improve the processing of civil claims and cut in half the amount of time it takes to resolve medical malpractice conflicts. Two significant reforms have taken aim at those goals: the creation of a new type of expert witness system and the establishment of specialized courts.<sup>40</sup>

#### *A. Reforming the Expert Witness System*

Japan's expert witness system, similar to those of France and Germany, is set out in article 212 of the Code of Civil Procedure.<sup>41</sup> The primary function of experts in Japan is to serve the court, generally consisting of a panel of three judges. Parties may also hire their own experts. Experts are generally identified as predisposed toward plaintiffs or defendants, and in Japan many more are available to defendants.

Until recently, in malpractice and other claims, parties who believed that they needed expert testimony submitted a motion to the court, and if the presiding judge agreed, the court would contact the appropriate experts.<sup>42</sup> It took on average 133.3 days for an expert to be successfully

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40. JUSTICE SYSTEM REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY (2001), available at [www.kantei.go.jp/foreign/judiciary/2001/0612report.html](http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html).

41. In France and Germany, judges can select individuals from a list of possible experts that is assembled annually by the court; no such list exists in Japan.

42. Between 1989 and 1998, experts were used in 22.5% of medical malpractice cases, and the plaintiffs' chances of prevailing in malpractice litigation involving experts increased from 29.9% to

recruited, a delay that resulted in part from the lack of a single, simple procedure for expert identification. Courts sometimes asked medical societies or academic medical departments for recommendations, but doing so was generally a ten-month process.<sup>43</sup> Parties could submit a list of potential experts to the court, but the opposing party was allowed to vet them, which was time consuming. Moreover, as a result of medical hierarchy and paternalism many experts, once identified, refused to advise courts on medical issues.<sup>44</sup> Senior physicians occupy the top of carefully crafted pyramids of power, and classmates, members of the same professional organizations, co-workers, and others with professional or personal ties were reluctant to get involved in cases that may make them adversaries. Financial considerations rarely offered a sufficient incentive to overcome such reluctance. The cost of expertise varied with the complexity of a case, but was generally between three hundred thousand and five hundred thousand yen, and almost never over one million yen.<sup>45</sup> Once a court secured the participation of an expert, the fee was paid to the court by the party that initially requested expert involvement (though this fee was ultimately paid by the losing party).

After experts agreed to serve and take an oath, the court provided them with pleadings and other relevant legal and medical documents, and requested either a written or (less frequently) oral report. Parties could submit written questions and seek clarification of written reports. They could also cross-examine experts who gave their reports orally. Experts who provided false testimony were subject to imprisonment for up to ten years.<sup>46</sup>

### 1. The “Conference” Approach

On January 8, 2003, the Tokyo District Court invited three physicians to discuss the merits of a malpractice claim involving a patient who

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39.1%. Noriko Sakamoto et al., *The Use of Experts in Medical Malpractice Litigation in Japan*, 42 MED. SCI. L. 200, 202 (2002).

43. Ayuma Murata, *Kantei ni tsuite* [On Expert Opinion], 1023 HANREI TIMES, Apr. 2000, at 18; Tokyo district court practice *dai-ichi* committee, *Kantel Jikō no Kettei Nado ni Muketa* [Committee on Standardizing Expert Opinions], 1018 HANREI TIMES, Mar. 2000, at 39.

44. Sakamoto et al., *supra* note 42, at 201.

45. Tokyo Chihō Saibansho Iryō Soshō Taisaku Iinkai [Tokyo Dist. Court Med. Malpractice Comm.], *Tokyo Chisai Iryō Shūchūbu ni Okeru Iryō Soshō no Shinri Jijyō ni Tsuite* [Circumstances of the Medical Malpractice Trial in the Tokyo District Court Medical Malpractice Consolidation Division], 1105 HANREI TIMES, Jan. 1, 2003, at 43 [hereinafter *Circumstances of Medical Malpractice Trial*].

46. KEIHŌ [PENAL CODE], art. 171.



underwent a jaw operation and died of heart failure.<sup>47</sup> The architects of this new “conference” method (*tōron hōshiki ni yoru kantei*) of consulting medical experts cite several advantages over the current system, including convenience (experts may convene via closed circuit television rather than traveling to the courthouse),<sup>48</sup> speed (experts will have only two months to review medical charts and conferences are limited to a single day),<sup>49</sup> and objectivity (bringing several experts together may reduce their tendency to defend the actions of other medical providers). In addition, experts prepare only a single page of notes prior to a conference, making it much more difficult for the parties to offer a detailed (and potentially aggressive) rebuttal. For those who avoid serving as expert witnesses because they do not want to be subjected to withering cross-examination, the new system should provide some welcome relief.<sup>50</sup>

## 2. Expert Commissioners

The most innovative and controversial reform involving experts is the creation of a group of special court advisors. As stated by the Judicial System Reform Council, “study should be given . . . to the manner in which new systems for expert participation in litigation should be introduced, in which non-lawyer experts in each specialized field become involved in all or part of trials, from the standpoint of their own specialized expertise, as expert commissioners (*senmon iin*) to support judges.”<sup>51</sup> Such experts will be called directly by the court and will assist in identifying and analyzing disputed issues, facilitating settlement, rendering opinions on technical issues, and evaluating evidence, among other functions. In contrast to traditional expert witnesses, expert commissioners will work exclusively as advisors to the court, and their opinions will not be considered formal evidence at trial. For this new system to succeed, it will have to overcome the view held by some

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47. *Ishi 3-nin, Tōron Hōshiki de Kantei [With Three Physicians, a Conference Method of Experts]*, ASAHI SHINBUN, Jan. 8, 2003. As of November 2003, the Tokyo District Court has only used the conference method on four occasions.

48. *Karate Kantei Nado TV Kaigi De*, NIKKEI SHINBUN, Apr. 18, 2002.

49. In the current system, a single expert may take many months, or even a year, to render an opinion.

50. See Noriko Yamamoto, *Slow Malpractice Suits Under the Knife*, MAINICHI SHIMBUN, Mar. 20, 2000. Under recent amendments to the Code of Civil Procedure, experts first present their views, followed by questions from the judge, then the party requesting an expert has the floor, and lastly the other party speaks.

51. American courts have also experimented with scientific advisors. Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049 (2000).

members of the plaintiff's bar that physicians and other medical experts will almost inevitably internalize a pro-defense bias. Otherwise, plaintiffs' attorneys are likely to oppose any form of expert involvement in medical malpractice cases that does not depend upon their explicit approval of every expert involved in a case.

### *B. Creating Specialized Medical Malpractice Courts*

In addition to the focus on how outside experts can assist courts, simultaneous efforts have aimed to help sitting judges understand and assess the input of experts. Most civil cases are randomly assigned. The Tokyo District Court, for example, has fifty divisions, each staffed by a panel of three judges. Filed cases are assigned to a division, which is responsible for the case until it settles or is tried. Instead of randomly assigning medical malpractice cases, several of Japan's most important courts—including the district courts in Tokyo, Osaka, Nagoya, and Chiba—have recently created “consolidation divisions” (*shūchūbu*) that specialize in malpractice claims.<sup>52</sup> Since 2001, for example, four of the fifty divisions of the Tokyo District Court have been assigned all of the malpractice cases filed (approximately two hundred). The hope is that judges in those divisions will acquire expertise that will better enable them to handle technical medical issues.<sup>53</sup> Thus, in some cases judges will have the ability to identify and engage with experts on their own, and in other cases they will be able to use their acquired expertise to comprehend and decide malpractice claims.

An analysis of the Tokyo District Court's *shūchūbu* that looks at 228 cases disposed of after October 1, 2002, shows that 36% (82 cases) were decided by the court's specialized judges, and 127 (55.7%) were settled through mediation.<sup>54</sup> Of the 228 cases decided by a judge, plaintiffs won 40.2% (82 of 228) and lost 59.8% (49 of 228).<sup>55</sup> Moreover, cases handled

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52. Such divisions have been endorsed by the Judicial System Reform Council, as well as by attorneys who specialize in medical malpractice. See Tatsuo Kuroyanagi, *Senmon Soshō no Kantei ni Tsuite* [Appraisal in the Special Litigation], 120 HŌ NO SHIHAI 83 (2001); Manabu Yamana & Hiroshi Ōshima, [Current Trends in Medical Malpractice Litigation], 54(2) JIYŪ TO SEIGI 14–21 (2003). For a detailed discussion of consolidation bureaus, see Circumstances of Medical Malpractice Trial, *supra* note 45.

53. Judges are regularly rotated; few postings last more than five years, and many are for only three. To acquire a useful degree of medical expertise and use it in medical cases, judges will probably need more time than is possible under the current system of judicial administration.

54. Yuri Kamata, Tetsuya Yamada & Takaitzu Ogawa, *Tokyo Chisai Iryō Shūchūbu ni Okeni Jiken no Gaikyō* [An Analysis of Cases Handled by the Tokyo District Court's Medical Malpractice Consolidation Division], 213 MINJIHŌ JŌHŌ 17 (2004).

55. Yamamoto, *supra* note 50.

by the medical court appear to proceed far more rapidly than malpractice cases channeled through the regular court system, with 35% of them disposed of within one year; the average case takes less than 17 months, making the medical court 10 months faster than the national average.<sup>56</sup> Each of the four specialized medical divisions receives an average of three to five new cases each month.

TABLE 6: TOKYO DISTRICT COURT, SPECIALIZED MEDICAL COURT (SHŪCHŪBU), 2001-2007<sup>57</sup>

Year	New Claims	Pending Claims	Disposed Claims
2001	126	162	22
2002	192	256	98
2003	180	262	164
2004	218	334	154
2005	195	337	191
2006	194	294	238
2007	201	280	215

Despite the effort to facilitate the involvement of experts in malpractice cases and create specialized medical courts, some judges and commentators argue that courts should decide a wide array of such cases without consulting experts.<sup>58</sup> Judge Fukuda Takahisa of the Tokyo District Court, for example, points out that the internet has enabled individuals to learn a great deal about medical issues and notes that expert opinions almost always conflict. Consequently, he believes that judges should be proactive in learning about medical issues and trust their own judgment.<sup>59</sup> Suzuki Toshihiro, a prominent plaintiff's attorney, agrees that attorneys and judges can often rely on their own understanding of the medical issues when determining whether malpractice occurred.<sup>60</sup> In short, at the same time that specialized courts have become operational and judges are working to facilitate the participation of experts in medical cases, some

56. *Id.*

57. Cases were accepted by the Specialized Medical Court beginning in April 2001. Special Medical Court Data: 2004–2007 (provided by Judge Keiko Mitsuyoshi) (on file with author).

58. Yamana & Ōshima, *supra* note 52.

59. Hirogaru, 'Kantei Hanare,' MAINICHI SHIMBUN, Apr. 16, 2002, at 3.

60. *Id.*

influential legal elites are claiming that such expertise is overrated and should play a less prominent role in medical malpractice cases.

#### V. EXOGENOUS INFLUENCES ON THE RISE OF MALPRACTICE LAWSUITS

In addition to the structural aspects of the civil litigation system that have affected malpractice, a set of factors exogenous to the legal system is particularly relevant to the rise in malpractice claims. First, the increasing number of people who are taking their medical providers to court is at least in part a result of the erosion of public trust in elites generally and physicians in particular. Public opinion surveys on such matters can be unreliable, but the available data support the conclusion that public trust in doctors has been declining. When a 1978 survey by the *Yomiuri Shimbun* newspaper, for example, asked patients about their level of trust in doctors, 21% said that they had a high level of trust and 68.2% said that they had a moderate degree of trust, with only 6.8% expressing some distrust and 0.8% saying that they do not trust doctors at all.<sup>61</sup> A decade later, in 1988, a survey by the *Asahi Shimbun* newspaper found that 21% of people responded positively to the statement “I don’t really trust my doctor” (*amari shinrai shiteinai*); that number dropped to 20% in 1992, increased to 28% in 1996 and to 30% in 2000, and settled at 26% in 2002.<sup>62</sup> This trend was underscored by a 2003 *Yomiuri Shimbun* survey of 3,000 people showing that 77% were very or somewhat anxious about being the victim of medical malpractice. Overall, the surveys reveal a gradual but clear decrease in trust and increase in distrust that is particularly dramatic among those between the ages of 20 and 40.

Hospital administrators have gotten the message and have been experimenting with different ways of regaining the allegiance of patients. Some, like Shizuoka Prefecture’s Seirei Hamamatsu General Hospital, have started to talk about patients as “customers,” and have begun to offer services that until recently would have been unthinkable.<sup>63</sup> Seirei Hamamatsu employs several doorwomen to greet patients, open their car

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61. Naikakutō seitō kōhō shitsu [Government IR Department Cabinet Ministry], Iryō ni Kansuru Yoron Chōsa [Poll on Medical Treatment], <http://www8.cao.go.jp/survey/s47/S48-02-47-15.html> (last visited Mar. 26, 2009).

62. Akiko Nakamura, *Zenkoku Yoron Chōsa Shōhō: Isha wo Shinrai Rokuwari Jyūni Nenkan de Jiwajiwa Teika* [Detailed Report of the National Public Opinion Survey], 147 ASAHI SOKEN REPŌTO 82, (2000) (1988, 1992, 1996, and 2000 data); *Zenkoku Yoron Chōsa Shōhō* [Detailed Report of the National Public Opinion Survey], 156 ASAHI SOKEN REPŌTO 170 (2002) (2002 data).

63. Mami Tsukahara, *Hospitals Trying to Overcome Distrust*, DAILY YOMIURI, Oct. 11, 2004.

doors, and treat them as if they were entering a luxury hotel.<sup>64</sup> To some extent, the erosion of trust has been fueled by the media and its intensive coverage of providers who have engaged in outrageous conduct (subjecting the wrong patients to high-risk procedures, altering medical records to cover-up evidence of mistakes, etc.), triggering public criticism of the medical system.<sup>65</sup> From this perspective, increases in malpractice litigation reflect a change in how people regard medical practitioners, and elites more generally, who are no longer perceived to be atop a rigid social hierarchy that makes them immune from legal attack.

Second, the financial needs of victims may be growing because of a retrenchment in benefits offered through national health care and other parts of the social welfare system. With higher co-pays resulting in higher out-of-pocket health care costs, those with injuries that they believe were caused by negligent medical care may be more likely to sue in order to recoup their expenses. This tendency was exacerbated by Japan's "lost decade" of economic stagnation in the 1990s; people were being asked to bear greater health care costs at a time when they had less money than they did ten years earlier.<sup>66</sup>

Third, as briefly mentioned earlier, media coverage of medical malpractice litigation has brought public attention to suing doctors. Both lawyers and patients, as well as judges, government officials, and others, are influenced by the media. In the late 1990s, media coverage of malpractice cases soared. A database that tracks stories in Japan's leading newspapers indicates that in 1990 there were only 161 stories about malpractice; that number jumped to 413 in 1997, 1258 in 1999, and between 2000 and 3000 per year since.<sup>67</sup> The increase was marked by a large number of stories written about a number of now-notorious medical mishaps, like a mix-up involving two patients who received the wrong surgery (the lung patient received heart surgery, and vice versa), and the cover-up of a mistake involving a faulty artificial heart-lung machine.<sup>68</sup> In addition, litigation brought by hemophiliacs against both the Ministry of Health, Labor and Welfare ("MHLW") and pharmaceutical companies in the 1990s created a political scandal that was widely viewed as an example of how innocent and helpless people are mistreated at the hands of the

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64. *Id.*

65. Leflar & Iwata, *supra* note 14, at 197.

66. Interview with Kuroyanagi Tatsuo in Tokyo, Japan (July 2005) (on file with author).

67. Yasushi Kodama, *Iryō anzen: How Safe is Safe Enough?*, 1339 JURISUTO 67, 73 fig.2 (2007).

68. Yoshiharu Kawabata, Health-Related Litigation in Japan (Apr. 28, 2006) (unpublished paper presented at the Dickinson College Symposium on Health, Law and Justice in Asia).

medical establishment (and was instrumental to the success of the lawsuit and settlement of hepatitis C claims in 2007).<sup>69</sup> Such stories depict medical malpractice litigation as a morally just cause, not the impecunious scheming of greedy parties, and pique the interest of the general public as well as attorneys and potential claimants.

Interestingly, at least from the American perspective, criticism of overly generous awards to plaintiffs, spiraling insurance premiums, greedy plaintiff's attorneys, or increases in claims that lead to undeserving lawsuits are virtually unknown in Japan. When an official publicly voiced such sentiments—like when a Deputy Minister at MHLW exclaimed that there are “growing numbers of money hungry weirdoes trying to get rich by blaming the medical world”<sup>70</sup>—the outburst led to demands for his resignation, not a groundswell of support. According to media accounts, the rising rate of malpractice claims reflects a growing number of medical accidents, not illegitimate lawsuits, insurance company gauging, or ambulance-chasing attorneys.<sup>71</sup>

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69. Eric A. Feldman, *Blood Justice: Courts, Conflict, and Compensation in Japan, France, and the United States*, 34 LAW & SOC'Y REV. 651, 682 (2000).

70. *Malpractice Victims Demand Vice-Minister's Dismissal*, MAINICHI DAILY NEWS, Apr. 29, 2003.

71. Regulators have undertaken a number of initiatives targeted at reducing the frequency of medical errors. Officials have created a mandatory accident reporting system, for example, that is managed by the Japan Council for Quality Health Care (“JCQHC”). Japan Council for Quality Health Care 2005, [http://jcghc.or.jp/html/English/about\\_jcqh.htm](http://jcghc.or.jp/html/English/about_jcqh.htm) (last visited Mar. 22, 2007). The Japan Board of Medical Societies has also set up a reporting system and is developing guidelines for disciplining doctors who have been convicted in criminal malpractice cases. *Specialists Group to Tackle Malpractice*, DAILY YOMIURI, Mar. 23, 2005. The government has sought to eliminate poorly performing doctors by beefing up the Medical Ethics Council, a ten-member group dominated by doctors and former Ministry bureaucrats. The Council's narrow mandate only allows it to discipline physicians (a) charged with professional negligence that results in death, (b) convicted of a criminal offense, or (c) who misappropriate funds by fraudulently submitting claims for government reimbursement. Since 1971, it has revoked only sixty licenses, none due to malpractice. To improve the Council's performance, the Ministry has charged it with meeting four times per year (rather than two), and has appointed new members trained in law and journalism. *Menkyo Torikeshi [Invalidating Licenses]*, MAINICHI SHIMBUN, June 26, 2003. Finally, various efforts are underway to improve the performance of physicians. The Japan Board of Medical Specialties announced in early 2005 that it was considering the creation of a licensing system that would be linked to the reporting of medical accidents. The MHLW is considering a revision to the Medical Practitioner's Law (*Ishi-hō*) that would require the retraining of physicians who commit medical errors. *Health Ministry Plans to Retrain Incompetent Docs*, DAILY YOMIURI, Feb. 21, 2005. Similarly, the Japan Medical Association is requiring providers who have been the subject of more than three medical malpractice complaints to undergo retraining. *Todōfuke Ishikai Ijifunsō tantō riji jiyōsayōkaseikatantōriji Gōdō renrakukaigi ryō to shitsu no kōjō ni muke, kakki teki na ketsudan [Joint Meeting of Directors of Prefectural Medical Associations in Charge of Medical Malpractice Conflict and Directors in Charge of Self-Cleaning Activation Made a Landmark Decision to Improve the Quality of Medical Care]*, NICHII NEWS, June 5, 2005, available at <http://www.med.or.jp/nichinews/n170605a.html>.

In sum, together with structural changes (discussed in Sections III and IV) that have affected the frequency of medical malpractice litigation, a variety of exogenous factors have contributed to (and been affected by) the rise in malpractice claims. A cycle has emerged in which more malpractice litigation triggers more media coverage of underperforming physicians; more media coverage negatively influences the public's view of elites; and a lower regard for elites, combined with fewer barriers to litigation, contributes to the willingness of people to sue. The result is both an increase in the number of malpractice claims and a weakening of whatever normative barriers may have inhibited litigation. As structural impediments to litigation are lifted, cultural constraints are weakened as well, and what occurs is both a rise in litigation rates and a changed view of litigation. The relatively small number of medical malpractice claims suggests caution in using them as the basis for a broad claim about law and society in Japan. Nonetheless, if one views the trend in malpractice litigation as indicative of what is occurring in other areas of civil litigation—and the aggregate data reported by Tom Ginsburg and Glenn Hoetker offers some support for that view<sup>72</sup>—it appears that Japan is currently experiencing an important shift in the role of tort law in the lives of its citizens.

#### VI. A NEW ERA OF JAPANESE TORT LAW: THE LURE OF THE COURTS

It is easy to imagine the many ways in which Japanese legal and political elites could have utilized tried-and-true methods to ensure that patient complaints about substandard medical care would rarely end up in court. They could have raised filing fees; made hiring experts to testify about the standard of care more difficult; randomly assigned malpractice cases to judges with little experience handling technical medical matters, thus ensuring delay; created attractive alternative dispute resolution mechanisms that were fast, cheap, and generous; placed tighter limits on damages; and more. One need not look far to find examples of state-created barriers to tort-based litigation that channel potential litigants away from the courts toward extra-judicial forms of redress. Such alternative forums have been a favored way of handling conflict, and may well have been an effective way of handling the rise in malpractice lawsuits.<sup>73</sup>

When the number of claims relating to automobile accidents began to escalate in the postwar era, for example, the government passed legislation

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72. Ginsburg & Hoetker, *supra* note 12, at 36–37.

73. JUSTICE SYSTEM REFORM COUNCIL, *supra* note 40.

in 1955 that required all vehicle owners to carry a minimum level of insurance (thirty million yen by the early 1990s) and stipulated that the owners were liable for all damages unless they could prove that (1) they were not negligent; (2) a third party, or the accident victim, was negligent; and (3) the owner's car was not defective. To collect, parties followed a finely grained procedure under which they consulted with a government traffic accident counselor, an insurance company representative, or a member of the bar association; the claim was evaluated; and payment was tendered. If parties were displeased with the settlement, they would go to a Traffic Accident Dispute Resolution Center. Claims over auto accidents ended up in court for two reasons—if complainants were unhappy about the settlement resolution, or if they initially demanded more of a payout than insurance would cover. In effect, the law channeled disputes through an administrative process that rejected the negligence standard and instead held vehicle owners strictly liable for auto accident-related harms. The result was a system in which most accident victims would recover, while imposing limited transaction costs and providing modest, capped damages. Disgruntled accident victims could always go to court and rely on traditional tort principles, but had to accept a significantly lower likelihood of recovery (and higher adjudication costs) than that enjoyed by holders of administratively processed claims.

Disputes over environmental harms also illustrate how tort claims have been channeled away from the courts. In a series of cases brought to the courts in the 1960s and early 1970s, plaintiffs relied on tort law principles and achieved a number of significant political and legal victories. As a consequence, the government created an extrajudicial mechanism to divert cases from the courts. Under the 1973 Law for the Compensation of Pollution Related Health Injury,<sup>74</sup> claimants can collect damages without proving a causal link between the existence of a pollutant and the emergence of health harms. In place of causation, claimants are permitted to show the administrators of the compensation fund (in the MHLW) that there is a statistical correlation between a particular disease and a particular type of pollution.<sup>75</sup> The showing is based on epidemiological data that relieves claimants of the burden of proving specific causation so long as they can establish a general correlation between the discharge of the allegedly polluting substance and the outbreak of disease.<sup>76</sup> As a result,

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74. Kōgai Kenkō Higai no Hoshō ni Kansuru Hōritsu [Law for the Compensation of Pollution Related Health Injury], Law No. 111 of 1973.

75. *Id.*

76. *Id.*



those who consider themselves victims of environmental pollution generally rely on non-tort rules and seek damages from the bureaucratically managed compensation system rather than through torts and courts.

Auto accidents and environmental harms are hardly the only areas in which personal injury compensation has been diverted away from the courts.<sup>77</sup> Although it is difficult to precisely identify the government's motivations for creating extra-judicial, non-tort remedies for certain personal injuries, one can make certain observations about the consequences of such an approach. For one, it is clear that the reliance on extrajudicial approaches to personal harms has limited the number of cases brought to the courts and made the government a crucial actor in the processing and resolution of tort-related claims.<sup>78</sup> In addition, administrative schemes in Japan have taken one of the goals of U.S. tort law—compensation—and made it the foundation of its system for managing accidental injuries. The U.S. experience, in contrast, has relatively few administrative compensation schemes, and litigation of personal injury claims is far more common.

In the area of medical malpractice as well, extra-judicial dispute resolution and compensation, especially the Japan Medical Association's ("JMA's") liability claims management system, has been used to manage injuries caused by malpractice.<sup>79</sup> More than half of Japanese physicians are members of the JMA, and most of them purchase membership bundled with malpractice insurance.<sup>80</sup> The JMA's malpractice insurance is priced at less than one thousand dollars per year, regardless of practice area, and

77. Conflicts over injuries involving pharmaceutical products are another example. The seminal dispute in this area involved a group of people suffering from a neurological disorder called subacute myelo-optico neuropathy, or SMON. As a direct consequence of a Kanazawa District Court decision, in 1979 the Ministry of Health and Welfare created the Adverse Drug Reaction Fund (ADRF, also known as the Drug Side-Effects Injuries Relief and Research Promotion Fund Act, and as the Relief Fund for Injuries Caused by the Side Effects of Medicines), administered by the government but financed through contributions by the pharmaceutical industry. All claims are evaluated by a group that operates under the auspices of the Ministry, and payments cover medical expenses, nursing expenses, a living allowance, and a pension or a lump sum to surviving family members. By 1995, for example, 1714 thalidomide-related claims had been paid, for a total of 4.7 billion yen (over 40 million dollars). Other related funds, like that created by the Innoculation Act of 1948, amended in 1977, provide avenues of redress for children who suffer from the side effects of compulsory vaccination.

78. See FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* (1987).

79. Japan's approach differs from U.S.-style medical screening panels in numerous ways (the JMA process is started by a physician, the insurance company plays a central role, and screening occurs before cases are filed). See Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181 (1990).

80. Masakatsu Kōmi et al., (*Shinpojyūmu*) *Iryō kago shoshō no shinri ni tsuite* [Symposium Regarding Trials in Medical Malpractice], 1023 HANREI TIMES 6 (2000).

includes coverage of approximately one million dollars per year with a ten thousand dollar deductible.<sup>81</sup> Physicians with JMA insurance who believe that they have harmed a patient as a result of malpractice can notify the local JMA office, which will investigate the incident and, in three to twelve months, either dismiss the claim or offer compensation. Payments are generally modest, with a largest recorded payment of \$1.3 million. Since the JMA system is overseen by a mix of JMA officials and insurance company employees, there is no public reporting requirement and thus little available data on the frequency or typical disposition of claims.<sup>82</sup> In fact, the system is only minimally publicized, and it is not clear how well informed patients are about its existence.

The JMA's extra-judicial dispute resolution mechanism has kept at least some cases away from the courts, thereby sidestepping the costs of litigation and providing compensation in certain relatively clear cases in which judges would be likely to find in favor of plaintiffs.<sup>83</sup> One might have imagined that the government, cognizant of the rising number of malpractice suits, would have tried to build on the JMA system. Doing so may have enabled it to keep the courts out of the malpractice business, so that disgruntled patients would resolve their grievances in a less adversarial and public way. But that is not how the state responded. Instead, a patchwork of government initiatives—some targeted generally at better enabling the business community to resolve disputes through the courts, and others aimed specifically at medical malpractice litigation—have made courts far more accessible and attractive to aggrieved patients than in the past. What this suggests, this Essay has argued, is a fundamental shift away from efforts to limit recourse to the courts—a shift that is both the result of and a continuing cause of new structural configurations and socio-political dispositions. No longer does the state

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81. In contrast, the mean medical liability insurance premium in the United States in 2000 was \$18,400, and for OB/GYN it was \$39,200. ECON. & STATISTICS ADMIN., U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004–2005, at 109. According to officials at Tokio Marine, Japan's largest insurance carrier, the company makes little or no profit on malpractice insurance. Instead, such insurance is a loss leader, enabling the company to sell physicians other profitable insurance products, like home and auto insurance. In fact, the cost of insuring a typical Mercedes in Tokyo is ten times the cost of malpractice insurance. The JMA also supports low malpractice insurance rates, which it believes help to boost JMA membership.

82. The one published study of the JMA's liability claims management system indicates that it handles four hundred claims per year, but this data is old and impossible to verify. See Nakajima et al., *supra* note 8, at 1637; NIHON ISHIKAI [JAPAN MEDICAL ASS'N], NIHON ISHIKAI ISHI BAISHOU SEKININ HOKEN [THE JAPAN MEDICAL ASSOCIATION'S MEDICAL RESPONSIBILITY COMPENSATION INSURANCE] (2001).

83. The lack of juries in Japan and Japan's professionalized judiciary make Japanese courts relatively more predictable than those in the United States. See Ramseyer, *supra* note 27, at 116–17.

simply slam the door on tort litigation by making courts particularly cumbersome and expensive. No longer do potential litigants face such daunting institutional barriers to suing that they have little choice but to resolve their claims through alternative channels. Instead, in the face of a rising tide of malpractice claims, the government has crafted a set of structural solutions that are at odds with its longstanding posture toward tort-based conflict. In doing so, it has eliminated many (but not all) of the impediments to using the courts to manage personal injury claims that have been the subject of so much attention from legal scholars.<sup>84</sup>

Changes in the relationship between law and society, however, do not occur in a vacuum; they are responsive to, and indeed a product of, economic trends, political opportunities, and social values. This Essay has thus emphasized not only structural changes in Japanese civil litigation, but also the socio-political context of the changes surrounding the emergence and resolution of medical malpractice claims, particularly the growing negative perception of medical and other elites. Just as legal rules and procedures have reshaped Japan's medical malpractice system, so too has the cultural context of that system been altered. It is difficult, perhaps impossible, to say whether changes in law triggered or trailed the broader social changes in which they are embedded. The more important observation is that the two are closely intertwined, and that a careful examination of conflicts over medical malpractice reveals their interdependence.

Broad economic and political factors were crucial to laying the groundwork of legal reform. The 1990s were a period of economic malaise in Japan, and Prime Minister Koizumi staked much of his political capital on administrative, political, and legal reform. Indeed, the changes one observes in medical malpractice coincide with a more general embrace of legal reform.<sup>85</sup> For almost a decade (and most powerfully since the late 1990s), the banner of "*shihō kaikaku*" (legal/judicial reform) has been waved by the Ministry of Justice, Japanese Federation of Bar

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84. There is of course nothing irreversible about this shift; old impediments to litigation may in the future be resuscitated or new ones could be created.

85. Just as one of Tokyo's local city councils has promoted a new smoke-free sidewalks policy under the banner that social relations once structured by informal manners are now governed by formal rules (*maná kara, rūru he*), the government more generally has expended a tremendous amount of energy since the late 1990s promoting the idea that the rule of law needs to be strengthened and that people need to be legally empowered. It is difficult to measure the degree to which such rhetoric shapes consciousness, not to mention the degree to which this consciousness influences the willingness to litigate. But there is some empirical support for the claim that rates of litigation are increasing across the board, and the new rhetoric of legal reform at least suggests a greater willingness to portray litigation as a social good.

Associations, Ministry of Education, Secretariat of the Supreme Court, legal academics, and others, all of whom have come together on a variety of blue ribbon panels to propose and implement a wide array of changes to Japan's legal system. Some have been targeted at specific areas of legal procedure, like the new Code of Civil Procedure; some have created laws where none had previously existed, such as the Freedom of Information Act and the law governing non-profit organizations; still others are aimed at the legal profession, particularly the restructuring of legal education. Medical malpractice litigation was hardly the prime mover of these many reforms, although it was important to some of them, like those involving the expert witness system. The high visibility of malpractice is the result of it becoming a "test case," offering reformers an opportunity to publicly demonstrate the concrete impact of far-ranging (and often ambiguous) new legal institutions. For policymakers seeking evidence of their commitment to civil justice, for example, the acceleration of the resolution of medical malpractice trials offers a rough-and-ready guide. So the Japanese government's new embrace of formal legal mechanisms is particularly visible in the area of medical malpractice, but it is surely not the only area of rapid change.

It is tempting to observe the legal changes surrounding medical malpractice in Japan and conclude that they are yet another example of Japan's alleged tendency to become more like the United States.<sup>86</sup> In fact, at least some of the recent changes surrounding tort law and malpractice litigation in Japan do seem to provide some evidence of "convergence" with the United States and perhaps a more general "global" convergence. These include the reliance on the formal legal process as a reasonable venue for the airing and resolving of malpractice claims, the willingness to train more attorneys to represent parties in malpractice cases, and the experimentation with specialized courts and the expert witness system. On the other hand, significant differences remain between the tort systems of Japan and the United States (namely the possibility of high pain and suffering awards, the existence of punitive damages and true contingency fee billing, the availability of juries, and more), that sharply differentiate the management of medical malpractice claims in the United States from those filed in Japan.

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86. *Medical Malpractice Litigation in Gastroenterological Practice in Japan: A 22-Yr Review of Civil Court Cases*, 101 AM. J. GASTROENTEROLOGY 1951, 1951 (2006) ("[T]he situation [regarding medical malpractice litigation] in Japan is gradually becoming more like that in the United States."). See also R. Daniel Keleman & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT'L ECON. L. 269 (2002).

The changes described in this Essay, therefore, ought not to be mistaken for what some have called the “Americanization” of Japanese law.<sup>87</sup> There is no compelling evidence that the Japanese tort system is converging with the U.S. tort regime, and much to suggest that the area of medical malpractice in Japan is characterized by structural and social features that will continue to distinguish it from U.S.-style malpractice litigation. Instead, what is occurring in Japan is an example of the complex interplay of formal legal rules and procedures with economic, political, and social factors that frame their existence, creating a symbiotic relationship in which structure and culture affect and are affected by each other. The results are a shift in the importance of tort law and a changed social context in which it operates. As the legal rules and procedures governing medical malpractice claims change, so too does the society in which they are embedded, laying the foundation for yet another stage in the long relationship between tort law and society.

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87. See, e.g., Keleman & Sibbitt, *supra* note 86. A somewhat stronger case can be made that malpractice law in Japan has become increasingly similar to that in Canada and the U.K., where pain and suffering awards are lower than in the United States, punitive damages and juries are uncommon, and contingency fees are of recent origin.